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A

Khairul Eirman bin Aziz v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–315–11 OF 2011
APANDI ALI, LINTON ALBERT AND TENGKU MAIMUN JJCA
18 FEBRUARY 2014

C

Criminal Procedure — Appeal — Appeal againts conviction and sentence — Fact, finding of — Whether there was intention to cause death — Whether trial judge had made perverse finding on issue of intention — Whether appellate intervention necessary — Penal Code s 300

D

62-year old Tan Kim Ayu ('the deceased') was found dead on the kitchen floor of her house. Both her legs and hands were tied and her face was covered with a piece of cloth. A red car belonging to the deceased's niece ('the stolen car') and the deceased's valuables were found missing. The post mortem report indicated that the cause of death was due to 'ligature stangulation'. Police investigations led to the arrest of the appellant at his house. From information disclosed by the appellant the police discovered the remote and key of the stolen car in the pocket of a pair of jeans belonging to the appellant. Other incriminating items such as gold items and jewelries belonging to the deceased were also recovered. In addition the police also recovered a pair of blood stained pants and *parang* from the stolen car. The blood stains on these items were later conformed to be that of the deceased. The appellant was charged with the offence of murder under s 302 of the Penal Code ('the Code'). The trial judge carefully analysed all the circumstantial evidence and the various information leading to discovery evidence before finding the appellant guilty of the offence of murder and sentencing him to death. This was the appellant's appeal against that conviction and sentence. In this appeal the appellant conceded that the findings of facts were not disputed and that the only dispute was on the issue of criminal intention to cause death. The appellant contended that based on the injuries sustained by the deceased there was no intention to commit murder.

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Held, dismissing the appeal:

(1) The discoveries of the stolen items from the appellant led to the undisputed fact that the appellant was at the scene of the crime and had committed the robbery. The evidence of the blood stains on the pants and the *parang* would irresistibly confirm that the appellant was the one who caused the injuries to the deceased (see para 17).

I

(2) It is trite law that intention could be proved by inferences from circumstantial evidence and facts. The question as to whether there was

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intention to cause death or not was a finding of fact. In the present case, the act of strangulating a frail old woman with a nylon rope with such great force that it caused asphyxia, as indicated by the blood spots in both eyes of the victim, was sufficient evidence to conclude that the act in all probability caused the death of the victim deceased. As such, the offence was within s 300 of the Code. This was also the finding of fact by the trial judge. In the absence of evidence that could show otherwise, there was no reason to disturb such findings of fact as to the cause of death and in particular the intention to do so (see paras 18 & 23–25).

[Bahasa Malaysia summary

Tan Kim Ayu berumur 62 tahun ('si mati') dijumpai mati di lantai dapur rumahnya. Kedua-dua kaki dan tangannya diikat dan mukanya ditutup dengan kain. Kereta merah yang dimiliki oleh anak saudara perempuan si mati ('kereta yang dicuri') dan barang kemas si mati didapati hilang. Laporan autopsi menunjukkan sebab kematian adalah akibat daripada 'ligature stangulation'. Siasatan polis membawa kepada penangkapan perayu di rumahnya. Daripada maklumat yang dikemukakan oleh perayu polis menemui alat kawalan jauh dan kunci kereta yang dicuri di dalam poket seluar jeans kepunyaan perayu. Barang-barang lain yang menunjukkan seseorang bersalah seperti dan barang-barang kemas yang dipunyai oleh si mati juga dijumpai. Selanjutnya pihak polis juga menjumpai sepasang seluar yang mempunyai kesan darah dan parang di dalam kereta yang dicuri. Kesan darah ke atas barang-barang ini kemudiannya disahkan darah si mati. Perayu dituduh dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun'). Hakim perbicaraan juga menganalisa secara teliti kesemua keterangan keadaan dan pelbagai maklumat yang membawa kepada penemuan keterangan sebelum mendapati perayu bersalah terhadap kesalahan dan menjatuhkan hukuman mati ke atasnya. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Dalam rayuan ini perayu berhujah bahawa dapatan fakta tidak dipertikaikan dan satu-satu pertikaian adalah ke atas isu niat jenayah untuk menyebabkan kematian. Perayu berhujah bahawa berdasarkan kecederaan yang dialami oleh si mati tidak terdapat niat untuk melakukan pembunuhan.

Diputuskan, menolak rayuan:

(1) Penemuan barang-barang yang dicuri daripada perayu membawa kepada fakta yang tidak dipertikaikan bahawa perayu berada di tempat kejadian jenayah dan telah melakukan rompakan tersebut. Keterangan kesan darah di atas seluar dan parang mengesahkan bahawa perayu adalah orang yang menyebabkan kecederaan kepada si mati (lihat perenggan 17).

(2) Adalah undang-undang yang nyata bahawa niat boleh dibuktikan oleh inferens daripada keterangan keadaan dan fakta. Soalan sama ada terdapat niat untuk menyebabkan kematian atau tidak adalah dapatan

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fakta. Di dalam kes ini, tindakan menjerut seorang perempuan tua yang lemah dengan tali nilon dengan kuat yang menyebabkan asfiksia, seperti yang ditunjukkan oleh bintik darah dalam kedua-dua mata mangsa, adalah keterangan yang mencukupi untuk memutuskan bahawa tindakan dalam kesemua kemungkinan menyebabkan kematian si mati mangsa. Oleh itu, kesalahan adalah dalam s 300 Kanun. Ini juga adalah dapatan fakta oleh hakim perbicaraan. Dalam ketiadaan keterangan yang akan menunjukkan sebaliknya, tidak ada sebab untuk campur tangan dapatan fakta sedemikian terhadap sebab kematian dan terutamanya niat untuk berbuat demikian (lihat perenggan 18 & 23–25).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Evidence Act 1950 s 27
Penal Code ss 299, 300, 302, 390, 412

Appeal from: Criminal Trial No 45–51 of 2008 (High Court, Johor Bahru)

Ameenuddin bin Mohamed Ibrahim (Ameen Harbhjan & Co) for the appellant.
Farah Ezlin bt Yusof Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] The appellant was convicted for the offence of murder, under s 302 of the Penal Code and was sentenced to death.

[2] Originally the appellant was jointly charged with another co-accused, Asrol Ashar bin Yusof. Nevertheless, at the end of the case for the prosecution, the High Court found that only the appellant was required to enter his defence on the murder charge and the charge against the co-accused was reduced to one under s 412 of the Penal Code, namely for dishonestly receiving stolen property. The co-accused pleaded guilty on the reduced charge and upon conviction, was sentenced to nine years imprisonment. The learned trial judge then, in calling for the defence, correctly amended the original murder charge by removing the common intention element. The amended charge, under which the appellant was convicted and sentence reads as follows:

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Bahawa kamu pada 29.11.2007 jam di antara 5.00 pagi dan 1.30 petang di rumah No. 42, Kampung Tengah 1, Teluk Kerang, Permas, di dalam Daerah Pontian, di dalam Negeri Johor Darul Ta'zim, telah melakukan bunuh ke atas Tan Kim Ayu (No. K/P: 460501-01-5022) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

FACTS OF THE CASE

[3] This is a case of robbery of a 62 years old woman that went awry. The murder took place in furtherance of a robbery.

[4] On 29 November 2007, at about 7pm, after being informed by SP10 (Tan Siew Goh, a niece of Tan Kim Ayu — the deceased) that her auntie has not responded to her numerous phone calls; SP20 (Yew Yee Yiu — who was then the boyfriend of SP10) went to the deceased house at No 42, Kampung Tengah 1, Telok Kerang, Permas, Pontian.

[5] Upon arrival at the house at about 7.30pm, SP20 noticed that SP10's car, a red Kancil No JJD 6592 was missing. SP20 saw that the door of the house was half-opened. He then entered the house and saw the house was in a mess. He proceeded to look for Tan Kim Ayu. In the kitchen SP20 saw Tan Kim Ayu ('the deceased') lying on the floor facing upwards but with her face covered with a piece of cloth and that both her legs and hands were tied. SP20 then rushed out to seek help at a school opposite the house. There he met the school security guard and two others. All of them then went into the house and the school security guard, SP5 then called the police.

[6] At about 9.45pm a police party led by SP8, C/Insp Noor Azlin arrived at the scene of the crime. The police cordoned the area and commenced investigations.

[7] On 2 December 2007 the appellant was arrested at his house at Kg Baru Penerok, Pontian. From information leading to discovery under s 27 of the Evidence Act 1950 (given by the appellant) the police discovered the remote and key of the red Kancil car from the pocket of a pair of jeans belonging to the appellant that was hanging on the wall of the house. Other incriminating items, a gold ring and chain was also discovered from the appellant.

[8] After the arrest of the appellant a second suspect (the co-accused) Asrol Ashar was arrested and another two rings and a chain were recovered on the second suspect's person.

[9] Later in the day of his arrest, further information leading to discovery was given the appellant. By such information given, the police discovered the

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stolen red Kancil belonging to SP10. In the stolen car a pair of blood stained pants were found. Later, at another location, the appellant led police to the discovery of a blood stained *parang*. All the blood stains on the pants and *parang* were later confirmed to be that of the deceased. All the gold items and jeweleries recovered were later identified and confirmed to belong to the deceased.

[10] The post mortem report indicated several injuries on the deceased but the cause of death was due to 'ligature strangulation'.

FINDINGS BY THE HIGH COURT

[11] The learned trial judge in a lengthy 'speaking' judgment had properly analysed all the evidence, in particular the circumstantial evidence and the various information leading to discovery evidence. We need not deal with the findings at length, as from the reading of the judge's grounds of judgment, it is suffice to say that the learned trial judge had applied the correct procedure and principle in his evaluation of the evidence.

[12] Learned counsel for the appellant at the hearing before us, in fact conceded that the findings of facts were not disputed, except that the only dispute is on the issue of criminal intention to cause death.

CONTENTION BY LEARNED COUNSEL

[13] The only issue raised by learned counsel for the appellant was on the issue of 'intention'. In fact, going by the petition of appeal too, that was the only ground forwarded by the appellant in the appeal before us. The whole petition reads as follows:

> PITISYEN RAYUAN KEPADA YANG ARIF HAKIM-HAKIM MAHKAMAH RAYUAN
>
> Perayu di atas setelah memfailkan Notis Rayuan kepada Mahkamah Rayuan Malaysia terhadap keputusan Yang Arif Hakim Tuan Samsudin Bin Hassan yang diberikan di Johor Bharu pada 15 November 2011 dimana Yang Arif Hakim telah diakhir kes pembelaan sabit dan jatuhkan hukuman gantung atas Perayu bagi satu kesalahan di bawah seksyen 302 Kanun Keseksaan. Kini memberi alasan bagi Perayu tersebut seperti berikut:
>
> 1. Yang Arif Hakim telah khilaf dari segi Undang-Undang dan fakta apabila gagal mengambil kira bahawa kecederaan-kecederaan yang dialami oleh mangsa tidak 'consistent' dengan niat untuk membunuh.
>
> Oleh yang demikian Perayu memohon Mahkamah Yang Mulia ini mengenepikan perintah yang dibuat oleh Yang Arif Hakim dan menggantikan dengan apa-apa perintah sebagaimana yang difikirkan wajar dan adil oleh Mahkamah Yang Mulia ini.

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[14] In his short submission, both written and oral, learned counsel argued on the differences between the offences of culpable homicide and murder. Counsel contented that based on the injuries sustained by the deceased, there was no intention to commit murder.

OUR ANALYSIS AND FINDINGS

[15] In the case before us, as indicated earlier, it is a case of a robbery that went awry. To appreciate the legal position, in such a situation, it is appropriate to refer to the relevant sections in the Penal Code. Firstly, s 390 of the Penal Code reads as follows:

> 390(1) In all robbery there is either theft or extortion.
>
> (2) Theft is 'robbery', if, in order to the commit theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.
>
> (3) Extortion is 'robbery', if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.
>
> Explanation — the offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

[16] Secondly, in respect of murder, s 300 of the Penal Code reads as follows:

> 300 Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[17] With the discoveries of the stolen items, namely the red Kancil and the jeweleries found and recovered from the appellant it is not disputed that at the

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material time and place the appellant was at the scene and was the one who committed the robbery. The evidence of the blood stains on the pants and the *parang* will irresistibly confirmed that the appellant was the one who caused the injuries to the deceased.

[18] The only issue is the question of intention to cause death. The deceased victim was a frail old woman aged 62. There was no real necessity to cause the injuries for purposes of a robbery. The cause of death was strangulation by using a noose around the neck of the deceased. Putting a noose around the neck and pulling it with such great force would in all probabilities will cause instant strangulation and death. The rope used was a nylon rope.

[19] A summary and conclusions of the post mortem report by the medical forensic specialist, Dr Mohamad Aznool Haidy ('SP12') reads as follows:

(1) The body was that of an adult Chinese female positively identified by her brother as the above named person.

(2) There was no significant underlying natural disease found on her body that could have caused or contributed to her death at the particular moment in time.

(3) The deceased was being restraint both her ankles and wrist with raphea rope and nylon rope respectively. There was also a nylon ligature rope with a cloth on the neck which was tied tightly.

(4) There was features of asphyxiation in view of multiple petechieal haemorrhages and congestion on the face as result of the tight ligature strangulation.

(5) There were multiple patterned bruises (rounded, tramline and linear) on the head. These injuries were recent and fresh. *These injuries were in keeping pattern with that due to blunt trauma inflicted with blunt and hard such as hammer, rattan or wood, or whichever object with similar patterns.*

(6) There were few contusions on the scalp head. *These injuries were in keeping pattern with that due to blunt trauma inflicted with blunt and hard object which could have contributed to her death via extreme pain, altered consciousness and bleeding.*

(7) Those injuries as mentioned earlier were NOT *consistent with pattern due to Self-inflicted Injury.*

(8) Those findings were consistent with that death due to asphyxia as a result of probable ligature strangulation. In my opinion, the patterns were in keeping with homicide.

(Emphasis added.)

[20] In giving evidence on the strangulation, at the trial, SP12 (at p 098 of the appeal records) said:

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(3) Kesan jerutan pada leher dengan corak tekapan pada kulit leher adalah konsisten dengan corak tali nylon yang dijumpai pada leher si mangsa. Ia terletak 8 cm dari hujung dagu dan 9 cm dari lekukan tulang dada ('Sternal Notch') pada garisan 'imaginary' tengah ('midline'). Kesan jerutan itu melilit ke belakang melalui bawah cuping telinga dan diakhiri dengan kesan berganda ('multiple layers or marks') di bahagian belakang leher yang sesuai untuk keadaan lilitan tali ('encircling rope') atau kain. Kesan jerutan berukuran 35-37 cm panjang dan 0.5-0.7 cm lebar.

[21] And further down (at p 100) SP12 concluded as follows:

Hasil daripada bedah siasat terhadap mayat ini, tiada bentuk penyakit yang nyata yang boleh menyumbang atau menjadi penyebab kepada punca kematiannya. Saya berpendapat, punca kematiannya ialah *jerutan pada leher* ('ligature strangulation'). Daripada kecederaan jerutan yang dialami oleh si mati, tiada atau hampir tiada 'chance of survival' yang ada pada beliau dengan kecederaan sedemikian.

(Emphasis added.)

[22] And on the force used to execute the strangulation, SP12 (at p 106 of the appeal records) said:

S: Berdasarkan analisa — *force* digunakan semasa *strangulation* —jelaskan?

J: Pada pendapat saya kekuatan atau *force* digunakan adalah mencukupi untuk meninggalkan kesan jerutan dan meninggalkan kesan kelemasan seperti bintik pendarahan pada kedua-dua belah matanya.

[23] It is trite law that 'intention' can be proved by inferences from circumstantial evidence and facts. To distinguish the fine distinction between the offender under ss 299 and 300 of the Penal Code, it noteworthy to refer to the words of Raja Azlan Shah FJ (as HRH then was) in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174:

Speaking generally, if the act *must in all probability cause death*, the offence is within s 300 of the Penal Code, and if the act *is only likely to cause death*, the offence falls within s 299 of the Penal Code.

(Emphasis added.)

[24] It is our judgment that from the facts of the case and the evidence adduced at the trial, the act of strangulating the old woman with a nylon rope with such great force that cause asphysia as indicated by the existence of blood spots in both eyes of the victim, is sufficient evidence to conclude that the act *in all probability* cause the death of the victim deceased. Such was also a finding of fact by the learned trial judge. In the absence of other evidence that can show otherwise, it is our judgment that there is no reason for us to disturb such findings of fact as to the cause of death and in particular the intention to do so.

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CONCLUSION

[25] Whether there is intention or not is a finding of fact. The crux of the appeal is whether the learned trial judge, as the decider of fact was wrong or had made a perverse finding on the issue of intention.

[26] As indicated above, we could not find any fault in the trial judge's finding on the issue of intention. For reasons stated above, we find that the conviction is a safe one. As such we unanimously dismissed the appeal. Accordingly the appellant's conviction and sentence under s 302 of the Penal Code are affirmed.

Appeal dismissed.

Reported by Kohila Nesan